Supreme Court, U. S.
FILED
AUG 29 1980
MICHAEL RODAK, JR., CLERK

No. 79-1236

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK L. CARSON, ET AL., PETITIONERS

v.

AMERICAN BRANDS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether a district court's order refusing to enter a tendered consent decree providing for injunctive relief in a Title VII case is appealable as either an order refusing an injunction under 28 U.S.C. 1292(a)(1) or a final decision under 28 U.S.C. 1291.

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*Frank L. Carson, Lawrence Hatcher, and Stuart E. Mines were plaintiffs-appellants below and are petitioners herein. American Brands, Inc. (T/A The American Tobacco Company), Local 182 of the Tobacco Workers International Union, and the Tobacco Workers International Union were defendants-appellees and are respondents herein.

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INTEREST OF THE UNITED STATES

In response to this Court's invitation of April 14, 1980, the United States filed a brief suggesting that the petition for a writ of certiorari should be granted both because a conflict exists among the circuits concerning the question presented and because the decision of the court of appeals "frustrates an important congressional policy embodied in Title VII of the Civil Rights Act of 1964" (May 1980 Brief for the United States As Amicus Curiae 6). The petition having been granted, we file this brief in support of petitioners' contention that the judgment below should be reversed.

Federal enforcement of Title VII has been vested by Congress in the Equal Employment Opportunity Commission and the Department of Justice. The Equal Employment Opportunity Commission has authority to bring civil actions against private employers under 42 U.S.C. 2000e-5(f)(1). The Attorney General has enforcement responsibility when the employer is a state government, governmental agency, or political subdivision. 42 U.S.C. (& Supp. II) 2000e-6.

STATEMENT

1. Petitioners, representing a class of black present and former seasonal employees and applicants for employment at the Richmond Leaf Department of the American Tobacco Company, commenced this action on October 24, 1975. The complaint alleged that respondents had violated Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253, 42 U.S.C. 2000e *et seq.*, and 42 U.S.C. 1981 by discriminating against black employees and applicants in, *inter alia*, hiring, promotion, transfer and on-the-job training opportunities, thereby restricting petitioners to lower paying, less desirable jobs traditionally reserved for black employees (A. 4).[1]

[1] "A." refers to the Appendix filed in the court of appeals.

After engaging in extensive discovery, the parties reached an agreement settling petitioners' claims. They then prepared a consent decree, signed it, and submitted it to the district court on April 1, 1977 for approval pursuant to Fed. R. Civ. P. 23(e). On June 2, 1977, the district court issued a memorandum opinion and order (Pet. App. 28a–51a) refusing to enter the proposed decree on the ground that it illegally granted racial preferences to black employees.

On September 14, 1979, the court of appeals, sitting en banc, dismissed petitioners' appeal for lack of jurisdiction, Chief Judge Haynsworth and Circuit Judges Winter and Butzner dissenting (Pet. App. 1a–27a).

2. The district court accepted as true for the purpose of considering the proposed settlement the following facts recited by petitioners in their brief in support of entry of the decree.

Respondent American Brands, Inc. operates the Richmond Leaf Department of the American Tobacco Company where it processes and stores leaf tobacco (Pet. App. 29a). Respondent Local 182, a member of respondent Tobacco Workers International Union, is the exclusive bargaining agent for all hourly paid production unit employees of the Richmond Leaf Department (*ibid.*).

Two categories of persons are employed in the Richmond Leaf Department—regular employees who work year-round and seasonal employees who work an average of six months a year (Pet. App. 29a–30a). Prior to September 1963, certain of the regular job classifications, including that of watchman, were reserved for whites only (*id.* at 30a). At the time the consent decree was presented to the district court, the company employed approximately 150 seasonal employees, all of whom are black, and approximately 100 regular employees, 66% of whom are black. To petitioners' knowledge no white person has ever been employed on a seasonal basis in the Richmond Leaf Department (*ibid.*).

Separate seniority rosters are maintained for regular and seasonal employees. A seasonal employee may trans-

fer to a regular position only if no regular employee is interested in the vacant position, and in so doing loses all accumulated seniority (Pet. App. 30a). The loss of seniority affects the employee's status for promotions, demotions, layoffs, recalls and vacations (*id.* at 31a).

While blacks constitute 84% of the company's production unit employees,[2] they hold only 20% of the supervisory positions (Pet. App. 31a). As of February 15, 1976, only one of the 16 persons employed in the position of watchman, a job formerly reserved for whites, was black (*id.* at 30a).

The consent decree negotiated by the parties proposed that the company's seniority and transfer policies be modified to allow seasonal workers to maintain seniority upon transfer to regular positions,[3] and to require that before outside hiring is attempted seasonal employees be given the opportunity to fill vacancies not filled by regular employees for all hourly paid permanent production jobs and for the job of watchman (Pet. App. 32a–33a). The decree also eliminated the requirement that seasonal employees serve a probationary period after transferring to regular positions (*id.* at 33a). In addition, the decree set a goal for the filling of production supervisory positions with qualified blacks so that one-third of such positions would be held by blacks by December 31, 1980 (*ibid.*).

Finally, the proposed decree contained an injunction prohibiting respondents from discriminating against black employees of the Richmond Leaf Department and a three-year reporting requirement so that compliance with its provisions could be monitored (Pet. 14; A. 51, 55).[4]

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[2]Since 1971, more than 90% of new hires at the Richmond Leaf Department have been black (Pet. App. 31a).

[3]The agreement also provided that employees already in regular positions would be credited with any time worked as seasonal employees, to be calculated according to the terms of the collective bargaining agreement (Pet. App. 32a).

[4]The proposed decree included a specific finding that the company was not engaged in any discriminatory *hiring* practices at the Richmond Leaf Department. Accordingly, it provided no relief for black applicants for employment (Pet. App. 32a).

3. The district court refused to approve the settlement, reasoning that in view of respondents' express denial of discrimination against the plaintiff class, the foregoing provisions of the decree (which benefitted only seasonal employees all of whom are black) constituted preferential treatment based on race and were thus violative of Title VII and the Constitution (Pet. App. 32a, 45a-48a). The court also determined that even if the parties had presented evidence of present discrimination or the present effects of past discrimination, the relief envisioned by the decree would be inappropriate because it was not limited to the actual victims of such discrimination (Pet. App. 39a-42a, 46a).

The court concluded by stating (Pet. App. 50a):

> When the parties have settled their differences without a violation of the law and without violating the right of any class members, the Court will enter an appropriate order without prejudice to the right of any person to seek redress for racial discrimination. But this Court will not, by entering the proposed Consent Decree provide the parties with a judicial license to practice racial discrimination.

4. After full briefing and argument, the court of appeals dismissed petitioners' appeal, holding that the district court's order refusing to approve and enter the consent decree was neither a final decision appealable under 28 U.S.C. 1291 nor an order refusing an injunction under 28 U.S.C. 1292(a)(1). It analogized the order to the denial of a motion for summary judgment in a case where a contrary decision would have resulted in entry of an injunction, and to the denial of class certification where the complaint seeks broad injunctive relief. Noting that in both such circumstances this Court has held that no appeal would lie (*Switzerland Cheese Ass'n* v. *E. Horne's Market, Inc.*, 385 U.S. 23 (1966); *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978)), the court of appeals saw no reason to reach a different result here (Pet. App. 5a-6a).

In addition to concluding that the district's court's order did not irreparably harm petitioners because they retained

the right to proceed to trial on their claim for injunctive relief and thereafter to seek appellate review of the refusal to enter the decree (Pet. App. 10a), the court of appeals observed that the parties were free to propose alternative decrees which the district court might approve (*ibid.*). Underlying the court's analysis was its view that district courts should maintain full control over the course of litigation through the entry of final judgment, and in so doing should guide the parties' efforts to compromise their claims (Pet. App. 7a–9a).

Three of the seven judges dissented, concluding in an opinion by Judge Winter that the order refusing to approve the consent decree is appealable under 28 U.S.C. 1292(a)(1) (Pet. App. 18a). The dissenting judges distinguished the district court's order from the refusal to certify a class in *Gardner*, *supra*, and from the denial of summary judgment in *Switzerland Cheese*, *supra*, reasoning that here the district court conclusively determined important issues that cannot effectively be reviewed following final judgment (Pet. App. 21a).[5]

SUMMARY OF ARGUMENT

The district court's order in this Title VII case refusing to approve a jointly proposed consent decree is appealable under 28 U.S.C. 1292(a)(1) as an order refusing an injunction. First, the order falls within the literal terms of the statute. The consent decree, if entered, would have compelled respondents to make specified changes in American Tobacco Company's employment practices and to refrain from discriminating in the future. In a word, the consent decree constituted an injunction. Had it been entered, the order doing so would have been appealable under Section 1292(a)(1). The district court's order refusing to enter the

[5] Reaching the merits, the dissenting judges concluded that the district court abused its discretion in refusing to approve the decree (Pet. App. 22a–26a). They would have modified the decree, however, to give notice and an opportunity to object to the subclass of applicants for whom no relief was provided in the settlement. See note 4, *supra*.

consent decree is likewise appealable under Section 1292(a)(1).

Second, the district court's order is one of "serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc.*, v. *Bodinger*, 348 U.S. 176, 181 (1955) (footnote omitted). Many of the benefits that flow from the parties' agreement to settle their differences by consent decree will be lost if the case has to be tried. The factors that motivate parties to enter into settlement agreements—savings of time and expense and the reduction of risk—evaporate once a case goes to trial. In addition, defendants lose the opportunity to influence both the form and the terms of the relief awarded plaintiffs. Defendants also lose the opportunity to protect their good name from a judicial determination that they have violated the law. And unrecoverable judicial resources are expended.

The district court's order here is particularly one of "serious, perhaps irreparable, consequence" in view of Title VII's statutorily expressed preference for voluntary resolution of charges of discrimination. Once a dispute has reached the litigation stage this policy can best be implemented by encouraging judgments on consent. Indeed, the consent decree has proven to be the dominant means by which the government resolves Title VII disputes.

Third, the district court's order cannot adequately be reviewed following a litigated final judgment. The parties' perceptions at the time of settlement, their assessment of the strengths and weaknesses of their case and the case against them, and the value they place on avoiding a trial cannot be recaptured once intervening events, including the trial they sought to avoid, have altered their perspective and the court's. Moreover, to the extent that a party fares better under a litigated judgment than under an improperly rejected consent decree, its willingness to challenge that rejection will likely fade. While the party disappointed after trial can be expected to appeal the refusal to enter the proposed consent decree, it may well be placed in the untenable position of trying to convince the

court of appeals to enforce a settlement providing relief not fully consistent with the facts actually adduced at trial.

Finally, prompt review would further the policies underlying the finality rule. Immediate appellate review of refusals to enter consent decrees would advance rather than hinder the course of litigation by eliminating unnecessary trials and the delay and expense that attend them. While appeals could conceivably be taken for dilatory purposes, the reasons underlying parties' willingness to enter into settlement agreements and the dynamics that take over once an initial settlement has been hammered out strongly suggest that rarely would an appeal be taken other than in good faith following a substantial effort to find an alternative common ground.

The district court's order is also appealable as a collateral order under 28 U.S.C. 1291. It "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, and [is] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978) (footnote omitted). For the reasons outlined above, the first and third prongs of this test have been satisfied. As for the second, although in evaluating a proposed settlement a district court must take a peek at the merits, the issue of whether the settlement should be approved is quite distinct from the post-trial issue of who is to prevail. A court may not reject a settlement merely because on the same facts it would, after trial, impose obligations and distribute benefits differently than did the parties, or because it doubts that at trial the parties could prove the facts on which they agree for purposes of settlement. Rather, the court's role is to assure that the settlement is fair, adequate, reasonable and noncollusive. Thus, the merits of the district court's refusal to enter the proposed consent decree in the instant case presents an issue separate from, and collateral to, the merits of the claims the parties seek to compromise.

ARGUMENT

I. THE DISTRICT COURT'S ORDER IS APPEALABLE AS AN ORDER REFUSING AN INJUNCTION UNDER 28 U.S.C. 1292(a)(1)

For as long as it has sat, Congress has generally limited appellate review to final decrees and judgments, eschewing piecemeal appeals and the delays they engender. *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201, 205 (1848). However, Congress has also recognized, as has this Court, that the interests of justice are furthered by allowing appeals from nonfinal decisions in certain circumstances.

Thus, 28 U.S.C. 1292(a) provides that "[t]he courts of appeals shall have jurisdiction of appeals from: (1) [i]nterlocutory orders * * * granting, continuing, modifying, refusing or dissolving injunctions, * * * except where direct review may be had in the Supreme Court." This legislative exception to the finality rule "spring[s] from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc.*, v. *Bodinger*, 348 U.S. 176, 181 (1955) (footnote omitted).

The courts of appeals are in conflict concerning whether a district court order refusing to enter a proposed consent decree is among those for which Congress intended to authorize immediate appeal. The court below concluded that it is not. In contrast, the Fifth Circuit concluded in *United States* v. *City of Alexandria*, 614 F.2d 1358 (1980), that such an order in a Title VII action falls within the literal terms of, and is appealable under, 28 U.S.C. 1292(a)(1).[6]

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[6]The Fifth Circuit reached this result based upon its own prior decision that an order *approving* a settlement providing for injunctive relief was an order "granting" an injunction within the meaning of Section 1292(a)(1). It followed, in the court's view, that an order refusing approval of such a settlement is an order "refusing" an injunction. 614 F.2d at 1361 n.5. Although the court sought to distinguish the instant case as relating to a class action (*ibid.*), "[t]he appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 470 (1978).

In our view, the result reached by the Fifth Circuit is the correct one.

A. The Order Falls Within The Language Of Section 1292(a)(1) And Is Of The Type The Statute Is Intended To Reach

At the outset we stress, as did the Fifth Circuit in *United States* v. *City of Alexandria*, *supra*, that the order appealed from falls within the literal terms of Section 1292(a)(1). Had the district court signed the proposed consent decree, respondents would have been compelled to make specified changes in American Tobacco Company's seniority, transfer and promotion practices, to work toward a specified goal for placing qualified blacks in production supervisory positions, and to refrain from thereinafter discriminating against black employees. Quite evidently, then, had the consent decree been entered, it would have constituted an order "granting" an injunction within the meaning of Section 1292(a)(1). By a parity of reasoning the district court's order rejecting the decree constitutes an order "refusing" an injunction.

While it is true, as the court below observed, that insofar as they remain free to go to trial petitioners have not altogether lost "their claims for final injunctive relief" (Pet. App. 10a), that fact does not strip the proposed consent decree of its injunctive character nor place the order refusing to enter the decree outside the reach of Section 1292(a)(1). First, an order refusing to enter a consent decree denies the parties to it "final injunctive relief" on the terms perceived by them to be most mutually advantageous. See pages 10–11, *infra*. Second, even if injunctive relief is eventually granted, a refusal to enter a consent decree deprives the parties of that relief while the case wends its way toward final judgment. In that sense, an order refusing to enter a consent decree containing injunctive provisions is akin to an order refusing a preliminary injunction, and is appealable to the same extent.

As noted above, Section 1292(a)(1) was enacted so that review could be had of "interlocutory orders of serious,

perhaps irreparable, consequence." *Baltimore Contractors, Inc.*, v. *Bodinger, supra*, 348 U.S. at 181 (footnote omitted). The order petitioners seek to appeal fits squarely within that category inasmuch as it effectively denies petitioners and respondents alike the opportunity to settle their dispute voluntarily, and to enjoy the benefits of having done so.[7]

A consent decree and a judgment following trial are not fungible. Both, of course, confer rights and impose duties on the parties they cover. However, a consent decree by its nature produces benefits that are eroded when a case goes to trial. One of the primary reasons litigants enter into voluntary settlements is to avoid the expense, delay and risk associated with litigation. As this Court explained in *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971):

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each gave up something they might have won had they proceeded with the litigation.

A second advantage of negotiated settlements is that they afford defendants an opportunity to influence the form as well as the terms of the relief granted plaintiffs. In Title VII proceedings this means that employers may seek to structure remedies compatible with their business

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[7] The court of appeals stressed (Pet. App. 8a) that the district court remained free to reconsider its refusal to enter the proposed decree, and that the parties remained free to submit alternative proposals more likely to find favor with the court. However, it is manifest that nothing short of an admission of discrimination by the respondents would persuade the district court in this case to approve any relief proposed by the parties, and that the specific class relief contained in the proposed decree will not be approved unless the parties demonstrate that every class member was an actual victim of discrimination. See page 4, *supra*.

interests. Another characteristic of negotiated settlements is that defendants are able to protect their good will by avoiding a judicial determination that they have discriminated.[8] Finally, settlements free judicial resources for use in other cases. These benefits are irretrievably lost once litigants proceed to trial. Even if a refusal to enter a consent decree could be overturned on appeal from a fully litigated judgment, great harm already would have been done. Cf. *Abney* v. *United States*, 431 U.S. 651, 660–662 (1977) (pretrial order rejecting claim of former jeopardy appealable under 28 U.S.C. 1291 since even if subsequent conviction reversed on appeal, defendant forced to endure trial that Double Jeopardy Clause designed to prohibit). Thus, the district court's order refusing to enter the consent decree was both serious and, most likely, irreparable.

In this most important of respects, a refusal to enter an injunction by consent differs markedly from a simple denial of summary judgment, the appealability of which this Court considered in *Switzerland Cheese Ass'n* v. *E. Horne's Market, Inc.*, *supra*. The sole unrecoverable loss when a summary judgment motion is erroneously denied on the ground that genuine issues of material fact exist is the time and expense expended by the parties and the court in proceeding to trial. However, only the disputed facts need be tried, and to the extent the dispute proves to be illusory (*i.e.*, to the extent the trial court erred in not disposing of the case by way of summary judgment), the trial will likely be *pro forma*. Thus, little of consequence turns on the denial of a motion for summary judgment.

Not only are the benefits of settlement irretrievable once a case goes to trial. The propriety of the court's re-

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[8] To accomplish this, defendants customarily insert in consent decrees or the settlement agreements underlying them a disclaimer of liability. As the court of appeals judges who dissented in the instant case observed (Pet. App. 25a), "[a] ruling [like the one made by the district court] that litigation may not be settled unless a party formally admits liability * * * or a court determines liability or a lack thereof, would defeat the general policy of the law to foster settlements since the very purpose of a settlement is usually to avoid an adjudication or a concession of rights."

fusal to endorse a settlement cannot as appropriately be reviewed after a litigated final judgment (or a judgment based on an alternative agreement) is entered. A settlement agreement reflects the parties' best assessment at a given point of the strengths and weaknesses of their respective cases, and of the advantages and disadvantages of, and risks and uncertainties inherent in, proceeding to trial. That state of facts, of mind, and of perspective cannot faithfully be reconstructed once intervening events have altered the parties' (and the court's) view of the case. The dissenting judges below correctly perceived (Pet. App. 20a–21a) that once a case is tried, "as a practical matter the propriety of the proposed settlement will not be raised again either in the district court or" on appeal.

Should, however, the settlement issue surface after final judgment, the appellant would be a losing plaintiff who would have been granted relief under the disapproved consent decree, or an unsuccessful defendant whose obligations would have been fewer under the decree. In either circumstance, where the refusal to enter the decree was improper but the trial court's findings of fact vary sufficiently from the facts as they appeared at the time the decree was disapproved to justify different relief, the court of appeals is placed in a rather difficult position. It can enforce the settlement even though subsequently developed facts prove its terms to be not fully justified, or it can enforce the litigated judgment even though to do so would deprive the parties of the benefits and risks of a bargain freely entered into and wrongly rejected by the trial court. Both approaches contain elements of unfairness to the parties. Permitting an immediate appeal from refusals to enter consent decrees would spare appellate courts the need to choose either alternative.

Because of the injunctive provisions of the proposed consent decree and the difficulties inherent in reviewing the district court's order once a litigated final judgment is entered, this case has little in common with *Gardner* v. *Westinghouse Broadcasting Co.*, *supra*, in which the Court held (437 U.S. at 480) that a denial of class certifica-

tion was not appealable under Section 1292(a)(1), primarily because "[i]t could be reviewed both prior to and after final judgment * * *." *Gardner* is further inapposite because the order involved in that case "did not pass on the legal sufficiency of any claims for injunctive relief" (437 U.S. at 481; footnote omitted), whereas the order in the instant case was premised on the belief that the injunctive relief sought by the parties has no legal basis and is itself unlawful.

Finally, an appeal should be permitted here not only because the district court's order comes within the language of Section 1292(a)(1) and is of serious, perhaps irreparable consequence, but also because prompt review would not lead to the evils the finality rule was designed to combat. Specifically, the availability of immediate appellate review from refusals to enter consent decrees would advance rather than disrupt the course of litigation and would not, as the court below feared (Pet. App. 8a–10a), involve the courts of appeals in a rash of appeals. The fact that an order is appealable does not, of course, mean that immediate review will in fact be sought. As a practical matter, if following the rejection of a proposed consent decree the parties believe they can reach an alternative agreement satisfactory to themselves and to the court, it is unlikely that they would undertake the expense and suffer the delay of an appeal without first exploring seriously such alternatives. At the same time, the possibility that its order might be appealed would serve as a check on precipitous or unwarranted action by the district court. Thus, an appeal is likely only where even after a sober second look the parties and the court are unable to find a common ground.[9] Given the parties' typical commitment to a voluntary resolution once an initial settlement has been hammered out (see note 13, *infra*) and the court's interest in resolving disputes expeditiously, the spectre raised by the

[9] An irreconcilable impasse is most probable where, as here, the court's refusal to enter the decree is based on its reading (or misreading) of the applicable law. In such circumstances, a prompt appeal is particularly appropriate. Cf. 28 U.S.C. 1292(b); 28 U.S.C. 1254(3).

court below (Pet. App. 9a) of "an endless string of appeals" does not loom very large.

B. Appealability Is Particularly Appropriate Here In Light Of An Important Congressional Policy Embodied In Title VII

As this Court recognized in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (citations omitted):

> Congress enacted Title VII * * * to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.

To that end, Title VII is structured so that a person claiming to be aggrieved by an unlawful employment practice must file a charge with the Equal Employment Opportunity Commission prior to instituting a civil action in the district court. 42 U.S.C. 2000e-5(b), (f). When a charge is filed and the Commission determines, after investigation, that there is reasonable cause to believe that the charge is meritorious, it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b).[10] As this Court noted in *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 72 (1975):

> Congress chose to encourage voluntary compliance with Title VII by emphasizing conciliatory procedures before federal coercive powers could be invoked.

As a practical matter, once a dispute has reached the courts this policy of voluntary resolution can best be im-

[10]The Attorney General has authority under the statute to bring suits against state and local government employers. 42 U.S.C. (& Supp. II) 2000e-6. In such suits, it is particularly appropriate to seek a non-litigated resolution of the dispute in order to minimize the strain on federal-state relations. The decision below would, in some circumstances, force the United States to go to trial against a state or local government even though the latter is willing to comply with the law voluntarily.

plemented by encouraging settlement through consent decrees.[11] This mechanism—the consent decree—has proven to be an invaluable means of enforcing Title VII.[12] As the Fifth Circuit noted in *United States* v. *City of Jackson, Mississippi*, 519 F.2d 1147, 1151–1152 (1975) (footnotes omitted):

> It is a highly useful tool for government agencies, since it maximizes the effectiveness of limited law enforcement resources; by reaching agreement with private parties as to the specifics of substantial compliance, the government may avoid the risks as well as costs of full scale litigation of each point.

The court further observed (*id.* at 1152 n.9):

> Because of the consensual nature of the decree, voluntary compliance is rendered more likely, and the government may have expeditious access to the court for appropriate sanctions if compliance is not forthcoming. At the same time, the private parties involved also minimize costly litigation and adverse publicity and avoid the collateral effects of adjudicated guilt.[13]

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[11] Although it is theoretically possible for the plaintiff to dismiss and settle out-of-court, the only way to secure injunctive relief enforceable by a contempt proceeding in the district court is to obtain that court's approval of the settlement agreement. It accordingly is the policy of both the EEOC and the Department of Justice to settle litigation by consent decree rather than by out-of-court agreement.

[12] Department of Justice records indicate that from 1966 to the present, the Department filed 193 suits under Sections 706 and 707 of Title VII, 42 U.S.C. 2000e-5 and 2000e-6. Of that number, 96 (49.7%) were settled by consent decree prior to trial. The Equal Employment Opportunity Commission has had similar experience. Its records show that between 1972 and 1979, the EEOC resolved approximately 1,021 of the 1,500 suits it filed under Section 706 and obtained 708 settlements before trial (69.3%), the overwhelming majority of which were by consent decree. In addition, the EEOC obtained consent decrees in all five Section 707 suits originally brought by the Department of Justice and transferred to the Commission pursuant to the 1972 amendments to Title VII, and has settled by consent 10 of the 15 Section 707 suits it has filed.

[13] Most of these benefits are equally applicable to private plaintiffs. Moreover, although respondents in the instant case now seek to re-

In sum, the decision of the court of appeals that appellate review of a district court's refusal to enter a consent decree is not available until after the case has been tried and a final judgment entered deprives the parties of this preferred mode of resolving Title VII disputes, contrary to the expressed will of Congress.

II. THE DISTRICT COURT'S ORDER IS APPEALABLE AS A "COLLATERAL ORDER" UNDER 28 U.S.C. 1291

In addition to its appealability under Section 1292(a)(1), the district court's order comes within a judicially recognized exception to the final judgment rule as an order that "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, and [is] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978) (footnote omitted). For the reasons set out above (see pages 10–12, *supra*), the order appealed from meets the first and third elements of that standard. Therefore, the sole remaining question is whether it presents an issue completely separate from the merits.

At the outset, a distinction should be drawn between the merits of a proposed settlement and the merits of the claims it seeks to compromise. The question a district court must face in evaluating a settlement is not whether the parties would have prevailed to the same extent and in the same respects had a trial produced factual findings identical to those stipulated to by the parties, nor whether

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pudiate the settlement (see note 14, *infra*), typically the value of the consent decree to the *defendant* is so great that the defendant will continue to support the decree on appeal after the district court has refused to enter it. See *United States* v. *City of Alexandria*, *supra*, 614 F.2d at 1360–1361. Cf. *United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, 443 U.S. 193 (1979). Indeed, respondents herein supported the proposed consent decree in the court of appeals and did not attempt to repudiate it until after the court had dismissed the appeal. Thus, denial of the right to appeal disadvantages parties on both sides of the bargain.

the facts adduced at trial would have mirrored those on which the parties agreed for purposes of settlement. As the Second Circuit said in *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 456 (1974), "[i]t cannot be overemphasized that neither the trial court in approving [a] settlement nor [appellate courts] in reviewing that approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute." Rather, the role of the courts is more limited: to assure that a proposed settlement is fair, adequate, reasonable and noncollusive. *City of Detroit* v. *Grinnell Corp.*, *supra*; *Bryan* v. *Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3d Cir.), cert. denied, 419 U.S. 900 (1974); *Flinn* v. *FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1976); *Cotton* v. *Hinton*, 559 F.2d 1326 (5th Cir. 1977); *Patterson* v. *Stovall*, 528 F.2d 108 (7th Cir. 1976); *Grunin* v. *International House of Pancakes*, 513 F.2d 114 (8th Cir.), cert. denied, 423 U.S. 864 (1975); *Mandujano* v. *Basic Vegetable Products, Inc.*, 541 F.2d 832 (9th Cir. 1976).

Thus, the issue of whether a proposed settlement should be approved is quite distinct from the post-trial issue of who is entitled to prevail. As the Ninth Circuit observed in *Norman* v. *McKee*, 431 F.2d 769, 773 (1970), cert. denied, 401 U.S. 912 (1971):

> The proposed settlement is independent of the merits of the case. It would not merge in final judgment. Disapproval of the settlement is not a step toward final disposition and it is not in any sense an ingredient of the cause of action. In itself, the district judge's order is final on the question of whether the proposed settlement should be given judicial approval.

And, as detailed in point I of this brief (see pages 11-12, *supra*), the benefits to the parties of settlement are irretrievable once a case goes to trial.

It follows that the district court's order in the instant case satisfies all three prongs of the collateral order exception to the final judgment rule. Moreover, as detailed ear-

lier in this brief (see pages 14–16, *supra*), the order's appealability would further rather than frustrate the policies underlying the rule of advancing the course of litigation and maximizing judicial resources,[14] and would promote the strong congressional policy favoring voluntary settlement of Title VII claims.

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[14] Respondents contend (Br. in Opp. 6–10) that the questions presented in the petition have been rendered moot by respondents' withdrawal of consent to the entry of the decree. The reason given by respondents for withdrawing their consent is that the law governing the substantive provisions of the decree has been changed by intervening decisions of this Court (*id.* at 8–9). However, in our view the consent decree signed by the parties is a conditional contract (conditioned upon approval by the district court in the proper exercise of its discretion) from which neither party has a right of revocation before the condition is met. 3A A. Corbin, *Contracts* § 649 (1960). Had one of the parties wished to repudiate the agreement before the district court had an opportunity to act, it would not have been free to do so under the terms of the agreement, though it would have remained free to argue to the court that because of unforeseeable changed circumstances the decree should not be entered (just as a party on like grounds can seek modification of a decree). The same rule should apply on appeal. Otherwise, a party's right to take an appeal would be conditioned on the acquiescence of its adversary. Nothing in the proposed decree agreed to by the parties to this case requires that result.

Parties should, of course, remain free to limit and condition their assent to a settlement agreement as they see fit. Here the parties did not enter into a separate agreement, but instead submitted a joint proposed consent decree. Nevertheless, underlying every settlement agreement, written or implied, is the implicit expectation that in deciding whether to approve the settlement the district court will act nonarbitrarily and in conformity with the law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1980

☆ U.S. GOVERNMENT PRINTING OFFICE: 1980 326451 55